re-valuations vanish; this might be called an extra-ordinary *de minimis* provision. But both provisions deal with re-valuation and neither touches a transaction which is exempted from re-valuation by the body of the section.

It may be true that, so far as my illustration goes, clause 2(b) of the schedule would be unnecessary but it may well have an application in other circumstances. In any event the words "such debt" in clause 2(b) plainly refer to a debt which "falls to be re-valued", in clause 2(a); the clause therefore supports my construction of section 6. The second limb of the proviso has an effective meaning which accords with the tenor of the section and with the general scheme of the Ordinance. The subordinate argument therefore breaks down.

The defendant concedes that the result of his main argument is arbitrary but he says the whole Ordinance is arbitrary; I do not accept this. The Ordinance is, in principle, entirely reasonable and practical. It aims at adjustment on a scale falling progressively in proportion to the actual inflation. Whether the scale fits the facts accurately at any given point is a matter of opinion but error in fact is quite different from arbitrariness. The defendant's argument means this — that if on 12th August, 1945 a man borrowed $10,000 Jap and promised to pay $1,000, new money, on March 1st, the contract is binding for the full amount (unless usurious) but if on the following day he borrowed another $10,000, or even $1,000,000 Jap, then whether he promised to pay $10,000, or $1,000 or only $100, the contract is wholly avoided — regardless of the rate and of every other circumstance. There is no possible reason for such an amazing and sudden change. Nothing remarkable occurred on that particular day. The truth is that the terminal date is not arbitrary. The scale has monthly rests for nearly three years; then it has daily rests for a fortnight; and it stops when it passes the ratio of 1,000 to 1. The legislature treated this as the practical limit of re-valuation.

The defendant therefore fails on both issues and judgment must be given for the plaintiff for $10,000 and costs. The land may be sold in enforcement of the lien and the plaintiff has leave to apply to the Registrar for directions for sale but if notice of appeal is given the advertisements should not be published until the appeal has been concluded.

Judgment for the plaintiff.

ARUNASALAM CHETTIAR
v.
NG TAI NYONG AND ANOR.

[Court of Appeal (Willan, C.J., Taylor and Spenser-Wilkinson, JJ.) July 6, 1950]

[F.M. — Civil Appeal No. 8 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1948 — Procedure by Originating Summons — Defence of defendant — Appeal.

This was an appeal from an order made in open Court upon an Originating Summons taken out in Malacca under section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The application was for a declaration that a reconveyance of certain mortgaged property was void as against the mortgagor and for an order that the security be re-instated, on the ground that the repayment of the capital debt in January and February, 1944, in occupation currency must be revalued, thus leaving the debt partly undischarged. The application was supported by an affidavit of the attorney of the plaintiff. The defendants did not enter an appearance to the Summons but they appeared in person at the hearing. They stated that they contested the application on the grounds that the debt had been repaid partly in Straits dollars and that the repayment had been demanded by the plaintiff. The learned Judge thereupon adjourned the Originating Summons into open Court. A further affidavit was then filed by the plaintiff's attorney in which inter alia he said "I observe that no demand for payment either in writing or verbally was made by my principal or his then agent." At the trial the defendants, who were asked to begin, gave evidence that payment had been demanded. At the conclusion of the defendants' case Counsel for the plaintiff stated that his case rested on the affidavits and submitted that the defendants had failed to prove either that a demand had been made or that payment had been made within three months of the alleged demand. The learned Judge held that a demand had been made and that payment had been made within three months of the demand and he therefore gave judgment for the defendants. On appeal it was argued that the judgment ought to be reversed as the procedure was wrong in that the plaintiff had no fair opportunity of meeting the case against him and that a decision had been reached upon an issue which was not on the record.

Held, (1) that the procedure followed in this case was that laid down by the Debtor and Creditor (Occupation Period) Ordinance, 1948, and even if it appears to be inappropriate or inadequate, it is not the duty of the Court to modify it; (2) that as there was nothing on the record to show that the plaintiff did not know the case he had to meet or that he had no fair opportunity of meeting it, there was no ground for the application for a rehearing and therefore the appeal must be dismissed.

Cases referred to:—

(1) *Blay v. Pollard and Morris* (1930) 1 K.B. 628.

(2) *Sanders v. Sanders* 19 Ch. D. 373.

CIVIL APPEAL.

F. G. Charlesworth for the appellant.

A. J. Bostock-Hill for the respondents.

The facts sufficiently appear from the judgment of Spenser-Wilkinson, J.

Willan, C. J. : —I have had the opportunity of reading the judgment of Spenser-Wilkinson J. in this appeal with which I agree.

Taylor, J. : —I have had the advantage of studying the judgment of Spenser-Wilkinson, J., while it was in draft. I agree with everything he has said and have nothing to add.

Spenser-Wilkinson, J. : —This was an appeal from an order made in open Court upon an originating summons taken out in Malacca under section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The application was for a declaration that a reconveyance of certain mortgaged property was void as against the mortgagor and for an order that the security be re-instated, on the ground that the repayment of the capital debt in January and February, 1944, in Occupation currency must be revalued, thus leaving the debt partly undischarged.

The originating summons first came on for hearing before the Judge in Chambers on the 9th February, 1950. The defendants had not entered an appearance to the summons, but they appeared in person at the hearing. They stated that they contested the application on the grounds that the debt had been repaid partly in Straits dollars and that the repayment had been demanded by the plaintiff. The learned Judge thereupon adjourned the originating summons into open Court.

The application had been supported by an affidavit made by the attorney of the plaintiff and filed at the same time as the originating summons. After the adjournment on the 9th February a further affidavit was made filed by the plaintiff's attorney on the 20th March, 1950, to which the account books of the plaintiff's firm were exhibited in so far as they related to the mortgage debt in question. Part of the third paragraph of that affidavit reads as follows :—

"3. According to the said accounts, which I verily believe to be true, I observe that no demand for payment, either in writing or verbally, was made by my principal or his then agent . . ."

The originating summons came on for hearing in open Court on the 11th April, 1950. The learned Judge ruled, as I think quite rightly, that the defendants ought to begin. Both the defendants gave oral evidence to the effect that payment had been demanded and they also called an employee of the deceased mortgagor who gave evidence to the same effect. The question of repayment in Straits currency appears to have been abandoned. At the conclusion of the defendant's case counsel for the plaintiff stated that his case rested on the affidavits and submitted that the defendants had failed to prove either that a demand had been made or that payment had been made within three months of the alleged demand. The learned Judge held that a demand had been made and that payment had been made within three months of the demand, and he, therefore, gave judgment for the defendants.

Against this judgment the plaintiff appealed. Mr. Charlesworth for the appellant conceded that upon the evidence adduced the defendants were bound to succeed; he did not, therefore, seek to reverse the judgment of the Court below, but contended that the procedure had been wrong and that there ought, therefore, to be a re-hearing. His first contention was that, as the respondents had failed to enter an appearance, they had no right to be heard at all and he relied upon Order 51 rule 10 of the Rules of the Supreme Court of the Straits Settlements. In my opinion there is no substance in this point. I think that the appellant having appeared twice—once in Chambers and once in open Court—and raised no objection to the defendants being heard cannot now take this point.

The main contention put forward by Mr. Charlesworth was that the appellant had no fair opportunity of meeting the case against him and that a decision had been reached upon an issue which was not on the record; he relied on the decision in *Blay v. Pollard and Morris*[1]. He further contended that the procedure laid down under the Ordinance is inappropriate and that where the legislature has laid down a procedure which appears to be unsuitable or inadequate to the particular case, it is the duty of the Court to devise other procedure and to see that the parties have an opportunity to state their case and to know what case they have to meet.

Dealing with this last point first, it is to my mind a novel proposition that where a statute has laid down a particular method of procedure, even if it appears to be inappropriate or inadequate, it is the duty of the Court to modify it. Nor do I consider it to be the duty of the Court to take points on behalf of litigants who are represented by counsel. There are often good reasons why counsel refrains from taking points which would appear to be open to him; he knows better than anyone else the details of his client's position. If the appellant in this case was not given the opportunity which he ought to have had in order to ascertain the defendants' case and to call the evidence necessary to rebut it, then it was in my opinion the duty of his advocate to make the necessary application to the

Court to rectify the position, as for instance, by applying by summons in chambers for particulars of the alleged demand.

As to the first point I can find nothing in the record to suggest either that the plaintiff did not know the case he had to meet or that he had no fair opportunity of meeting it. If further witnesses were thought necessary (as counsel for the appellant now suggests) the necessary further time could have been applied for. As it was, the appellant had two clear months between the hearing in chambers, when the question of demand was first raised, and the hearing in Court.

The arguments for the appellant are in my view disposed of by the points put forward by Mr. Bostock-Hill who appeared for the respondents. In the first place he pointed out that the issue as to whether or not there was a demand was clearly placed on the record in that part of the appellant's second affidavit quoted earlier in this judgment; and secondly he contended that the fact that a party's case might have been better conducted in the Court below is not a good ground of appeal. In support of this proposition he cited the case of *Sanders v. Sanders*[2] where Jessel, M.R. said in his judgment "That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal." In the same way it is no ground for asking for a re-hearing in order to adduce fresh evidence in the Court below.

For these reasons I thought the appeal ought to be dismissed.

In view of the criticisms made from the Bar upon the procedure laid down by Section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948, I think it desirable to add that in my opinion procedure by originating summons is, in many cases, quite unsuitable for dealing with some of the matters that fall to be decided upon applications under the section. In the particular case before us the procedure laid down was, as it turned out, adequate to the occasion; but other cases before the Court are leading, and are likely in the future to lead, to considerable difficulties. Where disputed questions of fact, such as duress or demand for payment, have to be decided it would, in many cases, be not only far easier but also in the long run more expeditious to proceed by action or suit with proper pleadings so that the issues can be clearly defined. Consideration might, I think, be given to the advisability of an early amendment of the Ordinance providing that the relief under section 11 should, in contested cases, be sought by action or civil suit.

Appeal dismissed.

TAN CHOON CHUAR AND ANOR.
v.
PUBLIC PROSECUTOR.

[Court of Appeal (Willan, C.J., Pretheroe and Russell, JJ.) July 9, 1950]

[F.M. — Criminal Appeal No. 39 of 1950]

Criminal appeal — Application to call further evidence — Statements taken from persons after trial of the appellants suggesting that appellants were wrongly convicted — Emergency Regulations, Regulation 4(1)(b) — Courts Ordinance, 1948, s. 30.

In this case an application was made to call further evidence at the hearing of the appeal of the appellants who had been convicted under Regulation 4(1)(b) of the Emergency Regulations, 1948. It appeared that after the trial of the appellants, the police took statements from two Chinese. In them, both these Chinese alleged that the two appellants had been wrongly convicted and that it was other Chinese named in the statements who were the real offenders.

Held, (1) that the application must be refused as the Court would not be an appropriate tribunal to hold the enquiry that would be necessary to arrive at a decision whether the statements were probably true; (2) that such an enquiry could more properly be taken by the proper executive authority.

Case referred to :—

(1) *R. v. Rowland* 32 Cr. App. R. 29.

MOTION for leave to call further evidence.

K. K. Benjamin for the appellants.

W. M. McCall for the respondent.

The facts of the case sufficiently appear from the judgment of the Court delivered by :—

Willan, C. J. : — By a Notice of Motion Mr. Benjamin, on behalf of the two appellants, applied under section 30 of the Courts Ordinance, 1948, for leave to call further evidence. The facts are that the first appellant was convicted under Regulation 4(1) (b) of the Emergency Regulations, 1948, for being in possession of a hand-grenade near the International Hotel, Batu Road, Kuala Lumpur, on the 26th of April, 1950. The second appellant was convicted under Regulation 5(1) of the said Regulations for consorting with the first appellant at the same time and place. The hand-grenade was thrown at the International Hotel and exploded outside it. Both the assessors returned opinions of guilty, with which the learned trial Judge agreed. Accordingly both the appellants were convicted and sentenced to death on the 20th of June, 1950. They have appealed to this Court.